SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/01/2002

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CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000667

FILED: _____

STATE OF ARIZONA F TYLER RICH

v.

MICHELLE A RAMSEY JOSE S PADILLA

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT
Cit. No. #8951673
Charge: PROSTITUTION
DOB: 11/01/79
DOC: 10/11/00

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement since receipt of Appellee's memo. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the Memoranda of counsel and the Transcripts of Proceedings, CD Nos. 70603022001, 50408032001, 50409042001, from the Phoenix City Court.

Appellant was charged with Manifest Intent to Commit an Act of Prostitution,[1] a Class 1 misdemeanor, in violation of Phoenix City Code Sec. 23-52(a)(3). The act was alleged to

[1] Appellant's Memorandum (a.k.a. Brief) , p. 2; Appellee's Memorandum, p. 1.

have occurred October 11, 2000.[2] Appellant entered a plea of not guilty and the case was tried in the Phoenix Municipal Court:

a) before the Honorable Patricia Whitehead, who handled pretrial motions;
b) before the Honorable Carol Berry to a jury which found Appellant guilty of the charge; and
c) to the Honorable Francisca Cota for sentencing.

The court imposed probation for one year, and because of Appellant's prior convictions, a mandatory 180 days in jail; however, because she was employed, the court allowed work release for time actually at work. Appellant filed a Notice of Appeal. Execution of the sentence, to include the 180 days' confinement, has been stayed pending this appeal.[3]

Appellant bases her appeal on a single issue: *that the trial court abused its discretion in admitting character evidence contrary to Rule 404, the Arizona Rules of Evidence.*[4] Appellee maintains that the trial was conducted fairly and that the conviction and sentence should be upheld. Because this case mixes questions of law and fact, I review the trial court's legal conclusion *de novo*.[5]

When reviewing a case for sufficiency of the evidence, an appellate court must not reweigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[6] All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.[7] Moreover, an appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[8] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the

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[2] Appellant's Memorandum, p. 3; Appellee's Memorandum, p. 1.
[3] Appellee's Memorandum, p. 1.
[4] Appellant's Memorandum, p. 4.
[5] State v. Gonzalez-Gutierrez, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996).
[6] State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).
[7] State v. Guerra, supra note 12; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert. Denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[8] *State v. Guerra*, supra note 12; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

lower court.[9] The Arizona Supreme Court explained in *State v. Tison* that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[10]

In general, the trial court has broad discretion to determine the admissibility of evidence. By definition, a party's admission is not hearsay;[11] furthermore, so long as the evidence is relevant,[12] violates no constitutional, statutory, or court rule,[13] and has sufficient probative value to "substantially outweigh . . . the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . . .",[14] it may be presented.

Four factors control the admission of evidence of prior acts under Evidence Rule 404(b):

(1) evidence must be admitted for a proper purpose;
(2) evidence must be factually or conditionally relevant;
(3) the trial court may exclude evidence if its probative value is substantially outweighed by danger of unfair prejudice; and
(4) the objecting party must have the opportunity to receive limiting instruction if requested.[15]

The critical portion of Rule 404(b) permits a showing of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[16] Furthermore, the rule has repeatedly been so applied in

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[9] Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra note 12; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).
[10] *State v. Tison*, 129 Ariz. 546, 553; 633 P.2d 355, 362.
[11] 17A A.R.S. Rules of Evid., Rule 801(d)(2) (1988).
[12] 17A A.R.S. Rules of Evid., Rule 401 (1997).
[13] 17A A.R.S. Rules of Evid., Rule 402 (1997).
[14] 17A A.R.S. Rules of Evid., Rule 403 (1997).
[15] *State v. Gulbrandson*, 184 Ariz. 46; 906 P.2d 579, cert. denied 116 S.Ct 2558, 135 L.Ed.2d 1076 (1995).
[16] 17A A.R.S. Rules of Evid., Rule 404(b) (1997).

various Arizona cases.[17] Here, the evidence is relevant because Appellant's admission to the officer shows motive and intent.[18] The State's attorney submitted for the court's consideration a field interrogation printout which said, "[the appellant] was loitering in a[n] area that was known for prostitution and . . . she admitted that she was trying to work, and that meant work as a working prostitute."[19] The court admitted the printout into evidence as a state exhibit.[20] Additionally, Appellant's husband admitted that "Michelle was a prostitute" when he met her."[21]

This evidence was factually relevant because the State presented sufficient evidence from which the jury could determine that Appellant had presented herself as a working girl. Appellant did not deny that she was "working on the previous occasion, September 6, 2002;[22] in fact, she admitted it.

The significant probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.[23] I find that this evidence does not have such a tendency.

The trial court must instruct the jury that they are to consider other act evidence only for the proper purpose for which it was admitted upon a request for such a limiting instruction.[24] The trial record captures discussion that a limiting instruction was contemplated, perhaps even advisable."[25] Appellant clearly had the opportunity to request this instruction, however, it is not apparent that the instruction was requested or given. The general rule is that the trial court does not err in failing to give a limiting instruction if trial counsel does not properly

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[17] See e.g., *State v. Roscoe*, 184 Ariz. 484, 491; 910 P.2d 635, 642 (1996) and *State v. Terrazas*, 189 Ariz. 580, 582; 944 P.2d 1194, 1196 (1997).
[18] RT, p. 34, ll. 3-5.
[19] RT, p. 18, ll. 17-20.
[20] RT, p. 18, ll. 24-25.
[21] RT, p. 124, 11.5-6.
[22] RT, p. 20, 11,17-20.
[23] *State v. Schurz*, 176 Ariz. 46, 52; 859 P.2d 156,162.
[24] *State v. Atwood*, 171 Ariz. 576, 639; 832 P.2d 593, 656.
[25] RT, pp. 68-69.

request such an instruction.[26] For that reason, I find no error.

This Court finds that the trial court's determination was not clearly erroneous.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter to the Phoenix City Court for all further proceedings associated with this case.

[26] *State v. Hyde*, 186 Ariz. 252, 278, 921 P.2d 655, 681 (1996); *State v. Atwood*, 171 Ariz. 576, 629, 832 P.2d 593, 646 (1992); *State v. Mincey*, 141 Ariz. 425, 434, 687 P.2d 1180, 1189 (1984).